

**Issue 8: Listing Process**

*Comment 58:* Listing the polar bear under the Act should be delayed until reassessment of the status of the species under Canada's Species at Risk Act (SARA) is completed.

*Our response:* When making listing decisions, section 4 of the Act establishes firm deadlines that must be followed, and does not allow for an extension unless there is substantial scientific disagreement regarding the sufficiency or accuracy of relevant data. Section 4(b) directs the Secretary to take into account any efforts being made by any State or foreign nation to protect the species under consideration; however, the Act does not allow the Secretary to defer a listing decision pending the outcome of any such efforts. The status of the polar bear under Canada's SARA is discussed under Factor D.

*Comment 59:* The Act was not designed to list species based on future status.

*Our response:* We agree. We have determined that the polar bear's current status is that it is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." This is the definition of a threatened species under the Act, and we are accordingly designating the species as threatened.

*Comment 60:* Use of the IUCN Red Listing criteria for a listing determination under the Act is questionable, and should not be used.

*Our response:* While we may consider the opinions and recommendations of other experts (e.g., IUCN), the determination as to whether a species meets the definition of threatened or endangered must be made by the Service, and must be based upon the criteria and standards in the Act. After reviewing the best available scientific and commercial information, we have determined that the polar bear is threatened throughout its range, based upon an assessment of threats according to section 4 of the Act. While some aspects of our determination may be in line with the IUCN Red List criteria (e.g., we used some Red List criteria for determination of generation time), we have not used the Red List criteria as a standard for our determination. Rather, in accordance with the Act, we conducted our own analyses and made our own determination based on the best available information. Please see the "Summary of Factors Affecting the Species" section for in-depth discussion.

*Comment 61:* The peer review process is flawed due to biases of the individual peer reviewers.

*Our response:* We conducted our peer review in accordance with our policy published on July 1, 1994 (59 FR 34270), and based on our implementation of the OMB Final Information Quality Bulletin for Peer Review, dated December 16, 2004. Peer reviewers were chosen based upon their ability to provide independent review, their standing as experts in their respective disciplines as demonstrated through publication of articles in peer reviewed or referred journals, and their stature promoting an international cross-section of views. Please see "Peer Review" section above for additional discussion.

Peer review comments are available to the public and have been posted on the Service's web site at: <http://alaska.fws.gov/fisheries/mmm/polarbear/issues.htm>. In addition to peer review comments, the Service also provides an open public comment process to ensure in part that any potential issues of bias are specifically identified to allow for the issue to be evaluated for merit. In our analysis of peer review and public comments we find that peer review comments were objective, balanced and without bias.

*Comment 62:* Requests were received for additional public hearings and extension of the public comment period.

*Our response:* Procedures for public participation and review in regard to proposed rules are provided at section 4(b)(5) of the Act, 50 CFR 424, and the Administrative Procedure Act (5 U.S.C. 551 et seq.)(APA). We are obligated to hold at least one public hearing on a listing proposal, if requested to do so within 45 days after the publication of the proposal (16 U.S.C. 1533(b)(5)(E)). As described above, in response to requests from the public, we held three public hearings. We were not able to hold a public hearing that could be easily accessed by each and every requester, as we received comments from throughout the United States and many other countries. We accepted and considered oral comments given at the public hearings, and we incorporated those comments into the administrative record for this action. In making our decision on the proposed rule, we gave written comments the same weight as oral comments presented at hearings. Furthermore, our regulations require a 60-day comment period on proposed rules (50 CFR 424.16(c)(2)), but the initial public comment period on the proposed rule to list the polar bear was open from January 9 to April 9, 2007, encompassing approximately 90 days. The comment period was reopened for comments on new scientific information from September 20 through October 22,

2007, an extra 32 days. We believe the original 90-day comment period, three public hearings, and second public comment period provided ample opportunity for public comment, as intended under the Act, our regulations, and the APA.

*Comment 63:* The Service's conclusion that this regulatory action does not constitute a significant energy action and that preparation of a "Statement of Energy Effects" is not required is flawed.

*Our response:* In 1982, the Act was amended by the United States Congress to clarify that listing and delisting determinations are to be based on the best scientific and commercial data available (Pub. L. 97-304, 96 Stat. 1411) to clarify that the determination was intended to be a biological decision and made without reference to economic or other non-biological factors. The specific language from the accompanying House Report (No. 97-567) stated, "The principal purpose of the amendments to Section 4 is to ensure that decisions pertaining to the listing and delisting of species are based solely upon biological criteria and to prevent non-biological considerations from affecting such decisions." Further as noted in another U.S. House of Representatives Report, economic considerations have no relevance to determinations regarding the status of the species and the economic analysis requirements of Executive Order 12291, and such statutes as the Regulatory Flexibility Act and Paperwork Reduction Act, will not apply to any phase of the listing process." (H.R. Rep. No 835, 97th Cong., Sess. 19 (1982)). On the basis of the amendments to the Act put forth by Congress in 1982 and Congressional intent as evidenced in the quotation above, we have determined that the provisions of Executive Order 13211 "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355), do not apply to listing and delisting determinations under section 4 of the Act because of their economic basis. Therefore, Executive Order 13211 does not apply to this determination to list the polar bear as threatened throughout its range.

*Comment 64:* There is insufficient information to proceed with a listing, and thus our proposal was arbitrary and capricious.

*Our response:* Under the APA, a court may set aside an agency rulemaking if found to be, among other things, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (5 U.S.C. 706(2)(A)). The Endangered Species Act